EX PARTE OR LATE FILED

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	CC Docket No. 98-62
To Declare Unlawful Certain RFP	)	
Practices by Ameritech	)	

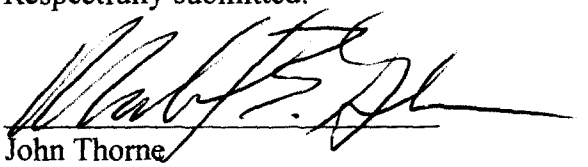
ERRATUM TO REPLY COMMENTS OF BELL ATLANTIC[1] ON SPRINT'S PETITION FOR DECLARATORY RULING

On June 19, Bell Atlantic filed reply comments in this proceeding. Bell Atlantic discovered a typographical error after filing its reply comments with the Commission. On page 7, the word "decree" should be replaced with the word "Act" in the first sentence of the second paragraph.

For the convenience of the Commission, Bell Atlantic has attached a complete copy of the corrected reply comments and respectfully requests that the Commission substitute this filing for the filing made on June 19.

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

Respectfully submitted.



John Thorne
Michael E. Glover
Eighth Floor
1320 North Courthouse Road
Arlington, Virginia 22201
(703) 974-2944

Attorneys for the Bell Atlantic
telephone companies

June 22, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	CC Docket No. 98-62
To Declare Unlawful Certain RFP	)	
Practices by Ameritech	)	

REPLY COMMENTS OF BELL ATLANTIC[1]
ON SPRINT'S PETITION FOR DECLARATORY RULING

The original declaratory ruling petition filed by Sprint in this proceeding was based upon the details of Ameritech's request for proposals from long distance carriers interested in entering into a teaming arrangement with Ameritech. That RFP, however, has been superseded by a substantially different arrangement that Ameritech actually entered into with one carrier (and that now is the subject of a separate formal complaint proceeding). As such, Sprint's petition is moot and should be dismissed.

Nonetheless, the comments on Sprint's petition raise legal issues with implications that go well beyond the narrow facts of the now-defunct RFP issued by Ameritech. These reply comments briefly address certain of these issues in the event that Sprint's petition is not (as it should be) dismissed as moot.

---

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

I. The RFP Has Been Superseded and Sprint's Petition Should Be Dismissed.

In its petition here, Sprint asked for a declaratory ruling that certain specific terms of an RFP issued by Ameritech were unlawful. See, e.g., Sprint Pet. 8 ("Sprint respectfully requests the Commission to declare the practices reflected in the RFP illegal...."). Nowhere, however, did it allege that Ameritech had entered into an agreement that contained the specific terms that it complained of, nor did it allege that Ameritech actually had implemented any such terms. Instead, it based its petition on the possibility that Ameritech might (or might not) at some future date, enter into an agreement that incorporates the terms of the RFP.

Not surprisingly, the RFP that was the subject of Sprint's premature petition now has been superseded by an actual agreement. The details of that agreement, moreover, appear to be substantially different than the RFP with respect to virtually every aspect of the RFP that was objected to by Sprint. See Ameritech Motion to Dismiss 2-3. And that actual agreement is now the subject of a separate formal complaint proceeding where a decision can be rendered based upon the facts as they actually exist. See Public Notice, DA-1164 (rel. June 16, 1998). As such, Sprint's petition based upon the terms of the RFP is moot and should be dismissed. See Yale Broadcasting Co. v. FCC, 478 F.2d 594, 602 (D.C. Cir.) cert. denied, 414, U.S. 914 (1973) (describing the Commission's "longstanding policy of refusing to issue interpretive rulings or advisory opinions").

II. The AT&T decree has no prospective effect and the D.C. district court's decisions from the 1980s interpreting that decree do not control the interpretation of the 1996 Act.

The bulk of authority and argument in the comments filed by the long distance carriers concerns various decisions of the district court construing the AT&T decree entered in United States v. AT&T, 552 F. Supp. 131, 226 (D.D.C 1982), aff'd mem. sub nom. Maryland v. United

States, 460 U.S. 1001 (1983). For several reasons, those decisions have no application to the present case.

First, Congress expressly eliminated the prospective effect of the AT&T decree. Section 601(a)(1) of the 1996 Act, 47 U.S.C. § 152 note, provides: "Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree." See also Conf. Rep. 123 ("The old consent decree obligations no longer exist with respect to post-enactment conduct, and the new obligations flow only from the statute.").[2] Contrary to the claim of the long distance carriers, therefore, Congress did not "codify" the decree (see AT&T Comments, Att. 1 at 16); Congress eliminated it.

Second, if Congress had wanted all the prior decisions of the D.C. district court regarding the AT&T decree to control the interpretation of 1996 Act (see MCI Comments at 9), Congress would at least have used the same terms in writing the Act. Instead, Congress used entirely different terms even when describing similar prohibitions. For example, Section II(D)(1) of the AT&T decree stated a BOC may not "directly or through any affiliated enterprise" "provide interexchange telecommunications services." 552 F. Supp. at 227. In contrast, Section 271 of the 1996 Act states a BOC and its "affiliates" may not "provide interLATA services." 47 U.S.C.

[2] The D.C. district court, following Congress's lead, terminated the decree and dismissed as moot all pending proceedings. Order, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Apr. 11, 1996).

§ 271(a). By using new terms, Congress confirmed that it meant to break with the past. In at least two key respects, moreover, the Act language is narrower than the decree. Section IV(O) of the decree provided: "'Telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission." 552 F. Supp. at 229 (emphasis added). Section 3(43) of the 1996 Act provides: "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The Act thus does not include the various ancillary services (such as marketing) that arguably may be "essential to" the provision of interLATA transmission, and therefore the Act's prohibition does not reach these activities.

In addition, the decree's long distance ban applied not just to "provid[ing]" certain services but to "provid[ing]" them "directly or through any affiliated enterprise." 552 F. Supp. at 227 (emphasis added). The D.C. Circuit held that "the term 'affiliated enterprise' covers all arrangements, contractual or otherwise, in which the BOCs have a direct and continuing share in the revenues of entities engaged in prohibited businesses." United States v. Western Elec. Co., 12 F.3d 225, 232 (D.C. Cir. 1993). The 1996 Act, by contrast, does not reach affiliated enterprises and indeed it specifically overturned the D.C. Circuit's affiliated-enterprise interpretation in the context of manufacturing royalties where the issue arose. See 47 U.S.C. § 273(b)(2).

The long distance commenters argue that a BOC cannot have "a direct financial stake in one long distance carrier." AT&T Comments, Att. 1 at 6. But this is a paraphrase of the D.C. district court's original definition of affiliated enterprise ("an affiliated enterprise exists if a BOC has a 'substantial incentive and ability unfairly to impede competition ...'") that was rejected by the D.C. Circuit. Western Elec., 12 F.3d at 232. And, contrary to the claims of the long distance commenters, the 1996 Act expressly permits direct ownership interests of up to ten percent. See 47 U.S.C. §153(1) (defining "affiliate" as a person under "common ownership or control," where "own" means an equity interest of more than ten percent). Accordingly, the long distance commenters' claim was not correct even under the decree prohibition that applied to affiliated enterprises; such an interpretation has no basis in the Act's narrower prohibition that is limited to "providing."

Third, the decision cited most frequently by the long distance commenters, the so-called Shared Tenant Services decision (see AT&T Comments, Att. 1 at 17-18; MCI Comments at 10), was questioned by the D.C. Circuit. The district court had ruled there that Ameritech was not permitted to provide a service that helped customers to select the lowest-price long distance service, in that case by "aggregating demand within a building and purchasing bulk interexchange services . . . for resale to end users." 627 F. Supp. 1090, 1100 (D.D.C. 1986). US West appealed the decision but Ameritech did not appeal. The D.C. Circuit cast doubt on the district court's interpretation, noting that "[a] number of different types of services fall under the [least cost carrier selection] rubric, and it is not evident that all of them are properly characterized as interexchange services." United States v. Western Elec. Co., 797 F.2d 1082, 1092 (D.C. Cir.

1986), cert. denied, 480 U.S. 922 (1987). Nonetheless, the Court didn't decide the issue because it said US West lacked standing to appeal.[3]

Fourth, many of the decisions of the D.C. district court actually contradict the long distance carriers' claim that all marketing-related activities were foreclosed under the decree. For example, the D.C. district court expressly allowed the BOCs to provide advertising services to all customers, including to long distance carriers. E.g., Order, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Apr. 13, 1987) (permitting Bell Atlantic to "prepar[e] advertising, including writing copy, art work, graphics, and other creative work, and place[] advertising in periodicals, newspapers, radio and television, or other advertising media for clients on a commission or fee basis;" and to "furnish[] services for direct mail advertising and compiling and selling mailing lists"); Order, United States v. Western Elec. Co., No. 82-0192 (D.D.C. Oct. 29, 1987) ("a waiver is not required ... for US West to enter the advertising business"). Similarly, the D.C. district court permitted the BOCs in some circumstances to share revenues with companies providing prohibited services. See generally M. Kellogg, J. Thorne & P. Huber, Federal Telecommunications Law 294-95 (1992) (summarizing decisions on revenue sharing).

---

[3] The long distance carriers also point to the decision by the D.C. district court interpreting the ability of the BOCs to "provide" customer premises equipment ("CPE") as allowing them to market and sell that equipment. United States v. Western Electric Co., 675 F. Supp. 655, 665-66 (D.D.C. 1987). But the issue there was a different one: Namely, whether or not the decree's ban on "manufacturing" CPE extended to the design and development of equipment, or whether design and development was a permissible part of "providing" CPE to customers. The distinction drawn by the court was merely between permitted "post-fabrication selling" -- such as when the BOC purchases, brands, and resells the equipment -- and impermissible manufacturing activities. Id. at 666. It has nothing to do with the separate question of whether a marketing arrangement with an unaffiliated entity that itself provides the underlying service, standing alone, constitutes the provision of that service.

The AT&T decree also allowed the BOCs to enter into "teaming" agreements with unaffiliated providers of long distance or other prohibited services. In fact, in the Shared Tenant Services proceeding, the U.S. Department of Justice acknowledged that the BOCs could participate in shared tenant service arrangements "by subcontracting or 'teaming' with an entity having no decree restrictions." See Response of the United States to Ameritech's Request for Clarification and Waiver of the Decree Regarding the Offering of Shared Communications and Related Services to Tenants, No. 82-0192, at 30 (D.D.C. filed Aug. 27, 1984).[4]

As the Commission recognized in the Non-Accounting Safeguards Order, there is no question that these arrangements also are permitted under the Act. There, Bell Atlantic and others argued that section 272(g) prohibits a BOC only from marketing or selling in-region interLATA service provided by an affiliate prior to obtaining authority under section 271; it does not prohibit them from aligning, or teaming, with a non-affiliate that provides interLATA services and marketing their respective services to the same customers prior to obtaining such authority. 11 FCC Rcd 21905, ¶ 289 (1996). The Commission agreed. Id., ¶ 293 ("We agree with the BOCs that the language of section 272(g) only restricts the BOC's ability to market or sell interLATA services 'provided by an affiliate required by [section 272].'"). As a result, it

[4] See also Memorandum of the United States in Support of Motions of the Regional Companies for a Waiver to Provide InterLATA Paging, etc., No. 82-0192, at 17, n. 32 (D.D.C. filed Feb. 1, 1993) ("The Regional Companies can currently provide interLATA 800 service through the use of 'teaming' arrangements, which the Department has found to be lawful under the decree."); id., ("Under such an arrangement, a Regional Company can inform subscribers that interLATA 800 services are available from a *particular* interexchange carrier, as long as subscribers are also told they are free to choose any interexchange carrier willing to provide such service, without violating the decree." (emphasis added)); Memorandum of the United States in Support of the Motion of the Bell Companies for a Waiver to Permit Them to Provide Information Services Across LATA Boundaries, No. 82-0192, at 17, n. 26 (D.D.C. filed May 8, 1995) ("The BOCs are permitted to offer information services using nonexclusive 'teaming arrangements' with interexchange carriers that include joint billing arrangements.").

held that BOCs may continue to enter into such arrangements provided that, "to the extent the BOCs align with non-affiliates," they "do so on a nondiscriminatory basis." Id.

In addition, the analogous GTE decree permitted the GTE telephone companies (known as "GTOCs") to recommend interLATA services to their customers even though the GTE decree barred the GTOCs from "providing" interexchange telecommunications services and subjected them to equal access and nondiscrimination obligations comparable to the BOCs'. See GTE Decree §§ V.A, V.B, V.C.1, United States v. GTE Corp., 1985-1 Trade Cas. (CCH) P 66,355 (1984). The U.S. Justice Department construed the GTE decree to allow the GTOCs to "analyze the customer's telecommunications requirements and recommend a mix of equipment and services to meet those requirements." Letter from Charles F. Rule, Department of Justice, to C. Daniel Ward, GTE, at 1 (Dec. 4, 1984). The GTOCs performed these services "in exchange for a flat-rate, non-traffic sensitive fee paid by the customer." Id. In particular, "[w]ith respect to interexchange or inter-LATA facilities and services, the GTOCs evaluate available information concerning interexchange services and recommend the service that is believed to be best suited to the customers' needs." Id.

Fifth, although Section 251(g) continues some of the AT&T decree requirements for a transitional period, it does not prohibit marketing arrangements. Section 251(g), by its terms, focuses on interconnection of networks: it provides that each local exchange carrier, in providing wireline services, "shall provide exchange access, information access, and exchange services for such access ... in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" that applied under the decrees. The purpose of the original decree provisions was to remedy an alleged denial of access to essential facilities. The Government had asserted that the BOCs' local telephone networks were

essential facilities, and the decree requirements accordingly are phrased in terms of connection of networks. See AT&T Decree §§ II(A), II(B), 552 F. Supp. at 227. It cannot plausibly be claimed that the BOCs have unduplicatable or essential marketing capabilities.

AT&T cites a district court decision where SBC had "endorsed" the quality of a long distance carrier that bought a switch from SBC. See AT&T Comments, Att. 1 at 19. The specific endorsement that the district court held objectionable said that, because the long distance carrier used SBC-provided equipment, its services were "completely compatible" with both SBC's and AT&T's networks. The implication of this endorsement was that other carriers that did not use SBC equipment might not be compatible. Making the local networks compatible with the services of all long distance carriers was the central duty under the equal access and nondiscrimination provisions of the decree; in 1985, at the time of this decision, the BOCs' work making the networks compatible was still underway. The BOCs have now completed that work,[5] and there is no claim by the long distance commenters that Ameritech (or any other BOC) is not giving them equal connections, or that Ameritech has told customers that Sprint's long distance network is somehow less "compatible" than others with Ameritech's network.

Sixth, for the same basic reason, the specific obligations that section 251(g) does impose apply only to the BOC itself and not to its non-local exchange affiliates. By its terms, section 251(g) expressly applies only to a "local exchange carrier" – which is defined by the Act as the entity that provides telephone exchange and exchange access service (47 U.S.C. § 153(26)) -- and only "to the extent it provides wireline services." (Here, the now-defunct Ameritech RFP

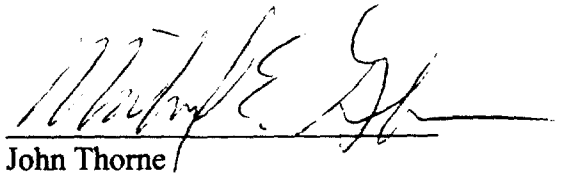
[5] See Opinion at 3, United States v. Western Elec. Co., No. 82-0192 (D.D.C. May 8, 1990) ("By the September 1, 1986 deadline, nearly all conforming offices had been converted to equal access.").

does not specify what entity would conduct any marketing). This is in sharp contrast to other provisions of the 1996 Act, including section 271(a) among others, where Congress expressly applied requirements to both the BOCs and their affiliates. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress Acts intentionally and purposely in the disparate inclusion or exclusion.'" (citation omitted)). And the fact that Congress deliberately extended the obligation only to the BOC in this instance is hardly surprising. It is only the BOC that operates supposedly essential local network facilities that other carriers must interconnect with to deliver their services, and only the BOC that arguably should be subject to any kind of equal access or non-discriminatory interconnection requirement.

Conclusion

The Sprint petition should be dismissed. In the event it is not, however, the Commission should reject the claim by the long distance incumbents that the AT&T consent decree and the decisions interpreting it control the interpretation of the 1996 Act.

Respectfully submitted.



John Thorne
Michael E. Glover
Eighth Floor
1320 North Courthouse Road
Arlington, Virginia 22201
(703) 974-2944

Attorneys for the Bell Atlantic
telephone companies

June 19, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1998 a copy of the foregoing "Erratum to Reply Comments of Bell Atlantic on Sprint's Petition for Declaratory Ruling" was sent by first class mail, postage prepaid, to the parties on the attached list.

Tracey M. DeVaux

Tracey M. DeVaux

* Via hand delivery.

Janice Myles*
Federal Communications Commission
Common Carrier Bureau
1919 M Street, NW
Room 544
Washington, DC 20554

(Hard copy and diskette)

ITS, Inc.*
1919 M Street, NW
Room 246
Washington, DC 20554

Sue D. Blumenfeld
John L. McGrew
Attorneys for Sprint Communications Co.
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20046

Leon Kestenbaum
Vice President and General Counsel, Federal
Sprint Communications Company, L.P.
1850 M Street, N.W.
Washington, DC 20036